

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**DANETA LOWE**

Claimant

VS.

**PRESBYTERIAN MANORS, INC.**

Respondent

Self-Insured

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Docket No. 208,653

**ORDER**

Respondent appealed the Award dated December 11, 1997, entered by Administrative Law Judge John D. Clark. The Appeals Board heard oral argument in Wichita, Kansas, on July 10, 1998.

**APPEARANCES**

Brian D. Pistotnik of Wichita, Kansas, appeared for the claimant. Ross A. Hollander of Wichita, Kansas, appeared for the respondent.

**RECORD AND STIPULATIONS**

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

**ISSUES**

On September 30, 1995, claimant injured her back while working for the respondent. Averaging a 28 percent task loss with a 38 percent wage loss and after deducting 4.5 percent for preexisting impairment, the Judge awarded claimant benefits for a 28.5 percent permanent partial general disability. Also, the Judge found claimant's average weekly wage was \$264.15.

The issues on this appeal are:

- (1) What is the nature and extent of claimant's injury and disability?

Respondent contends claimant's permanent partial general disability should be limited to her functional impairment rating because she allegedly failed to make a good faith effort to find appropriate employment after recovering from her injury. Also, respondent contends claimant is magnifying her symptoms.

(2) What is claimant's average weekly wage?

Respondent contends the Judge erred in computing the average weekly wage as claimant's regular and customary work week was less than the 40 hours that the Judge utilized.

(3) Are certain chiropractic records part of the evidentiary record when the chiropractor did not testify and the claimant timely objected to their being admitted into evidence?

Claimant contends she timely objected to those records and, therefore, they should not be considered as part of the evidentiary record pursuant to K.S.A. 44-519.

#### **FINDINGS OF FACT**

After reviewing the entire record, the Appeals Board finds, for the reasons explained below, that the Award should be modified to reduce the permanent partial general disability from 28.5 to 5 percent, to correct the average weekly wage calculation, and to exclude the inadmissible records.

(1) The parties stipulated that Daneta Lowe injured her back while working for Presbyterian Manors, Inc. on September 30, 1995. On that date, Ms. Lowe experienced back and left leg pain while lifting a patient to change soiled clothing.

(2) As a result of the September 1995 accident, Ms. Lowe initially received treatment from the company physician, Dr. Timothy Koehler, and her chiropractor, Dr. David Smith. Later, she treated with orthopedic surgeons Paul D. Lesko, M.D., and Robert L. Eyster, M.D. Dr. Eyster initially recommended surgery to fuse the spine. But he changed his mind after reviewing information from Mitchel A. Woltersdorf, Ph.D., who conducted psychological tests on Ms. Lowe.

(3) Based upon Dr. Eyster's testimony, the Board finds that the September 1995 accident aggravated degenerative disc disease in Ms. Lowe's spine. She should now observe the following medical restrictions: no repetitive lifting over 20 pounds; no bending or twisting; and, no working while bending forward. Also, Ms. Lowe should periodically perform back exercises. The Appeals Board finds Dr. Eyster's testimony persuasive, as did the Administrative Law Judge.

(4) The Appeals Board agrees with Judge Clark's finding that Ms. Lowe now has a 5 percent whole body functional impairment as a result of the September 1995 injury. That rating was provided by Dr. Eyster.

(5) Ms. Lowe last worked for Presbyterian Manors in mid October 1995. Since October 30, 1995, Ms. Lowe and Presbyterian Manors have had no contact.

(6) After leaving Presbyterian Manors' employment in October 1995, Ms. Lowe has worked for two other employers. From December 12, 1995, through February 11, 1996, Ms. Lowe worked part-time for Merry Maids performing light house cleaning. After that job, she worked part-time through June 6, 1996, as an upholsterer at Aero Star, a company owned by family friends.

(7) Ms. Lowe has put forth minimal effort to find appropriate employment since leaving Aero Star's employment. Although the job placement services that Presbyterian Manors provided in 1997 were disorganized, the Appeals Board is not convinced that Ms. Lowe has given a genuine effort to find employment since she last worked. Including those companies contacted during the job placement programs, it appears that Ms. Lowe contacted only a handful of potential employers in the 14 or 15 month period that elapsed after she left Aero Star in June 1996 until she testified in September 1997. Further, during job placement, when she did contact a potential employer, Ms. Lowe represented that she was restricted far more than her medical restrictions indicated. Additionally, Ms. Lowe never bothered to contact Presbyterian Manors to inquire about accommodated work after October 1995. As Ms. Lowe has applied for social security disability benefits, more probably than not she is not looking for employment. Considering the entire record, the Appeals Board finds that Ms. Lowe failed to put forth a good faith effort to find appropriate employment after leaving Aero Star in June 1996.

(8) Based upon the opinion of vocational rehabilitation counselor Karen Terrill, the Appeals Board finds that Ms. Lowe retains the ability to earn between \$6 and \$7 per hour, or approximately \$260 per week.

(9) As a result of the September 1995 accident, Ms. Lowe has lost the ability to perform 32 percent of the job tasks that she performed in the 15-year period immediately preceding the date of accident. That finding is based upon Dr. Eyster's testimony, which indicated that Ms. Lowe had lost the ability to perform 28 percent of the former work tasks compiled by Karen Terrill and 36 percent of the former work tasks compiled by human resources expert Jerry Hardin.

(10) In 1993, Ms. Lowe strained her back while working for Presbyterian Manors. After that injury, she received medical treatment from a minor emergency center on one occasion and performed light duty work for two weeks. After approximately one month, her symptoms resolved.

(11) The record fails to establish that Ms. Lowe had a preexisting impairment before the September 1995 accident. Although she probably had a preexisting degenerative disc condition before that accident, the condition was asymptomatic and, therefore, did not impair or adversely affect Ms. Lowe in any discernible manner. Additionally, Dr. Eyster testified that he would not have given Ms. Lowe an impairment rating for the relatively insignificant symptoms that she had in her low back before September 1995.

(12) When working for Presbyterian Manors, Ms. Lowe was scheduled to alternately work 32- and 40-hour weeks. In their briefs to the Appeals Board, the parties agree Ms. Lowe earned \$6.53 per hour on the date of accident and averaged \$6.87 per week in overtime. Also, Presbyterian Manors' brief indicates Ms. Lowe received \$3.22 per week in fringe benefits.

#### CONCLUSIONS OF LAW

(1) Ms. Lowe's average weekly wage is \$245.17. K.S.A. 44-511(b)(4) provides in part:

(ii) the straight-time weekly rate shall be found by multiplying the daily money rate by the number of days and half days that the employee usually and regularly worked, or was expected to work, but 40 hours shall constitute the minimum hours for computing the wage of a full-time hourly employee, **unless the employer's regular and customary workweek is less than 40 hours, in which case, the number of hours in such employer's regular and customary workweek shall govern. . . .** [Emphasis added.]

Because Ms. Lowe alternately worked 32- and 40-hour weeks, the Appeals Board finds that she regularly and customarily was expected to work an average of 36 hours per week. Therefore, Ms. Lowe's straight-time weekly rate is \$235.08 (36 hours x \$6.53). Adding that straight-time weekly rate with the \$6.87 in average overtime and the \$3.22 in fringe benefits produces a \$245.17 average weekly wage.

(2) Because hers is an "unscheduled" injury, the formula for permanent partial general disability benefits is governed by K.S.A. 44-510e, which provides in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be

entitled to receive permanent partial general disability compensation in excess of the percentage of the functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

That statute, however, must be read in light of Foulk<sup>1</sup> and Copeland.<sup>2</sup> In Foulk, the Court held that a worker could not avoid the presumption of no work disability contained in K.S.A. 1988 Supp. 44-510e by refusing to attempt to perform an accommodated job that paid a comparable wage that the employer had offered. In Copeland, the Court held, for purposes of the wage loss prong of K.S.A. 44-510e, that a worker's post-injury wage would be based upon ability rather than actual wages when the worker failed to put forth a good faith effort to find appropriate employment after recovering from the injury.

(3) As indicated in the findings above, Ms. Lowe has not established that she has made a good faith effort to find appropriate employment after leaving Aero Star's employment in June 1996. A worker is required to put forth a good faith effort to find appropriate employment before, during, and after a job placement program. Therefore, for purposes of the wage loss prong and the permanent partial general disability formula, the Appeals Board imputes the \$260 per week wage that she retains the ability to earn. Comparing \$260 to her pre-injury average weekly wage of \$245.17, the Appeals Board finds there is no difference in pre- and post-injury earnings.

(4) Because there is no difference between Ms. Lowe's imputed post-injury and her actual pre-injury earnings, the permanent partial general disability is limited to her functional impairment of 5 percent.

(5) Ms. Lowe timely objected to the admission of certain chiropractic records. The doctor who prepared those records did not testify.

The Appeals Board concludes that although the records may be considered when other medical experts formulate their opinions, the documents are not admissible pursuant to K.S.A. 44-519. That statute provides:

No report of any examination of any employee by a health care provider, as provided for in the workers compensation act and no certificate issued or given by the health care provider making such examination, shall be competent evidence in any proceeding for the determining or collection of

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<sup>1</sup> Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140, *rev. denied* 257 Kan. 1091 (1995).

<sup>2</sup> Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

compensation unless supported by the testimony of such health care provider, if this testimony is admissible, and shall not be competent evidence in any case where testimony of such health care provider is not admissible.

Here, Ms. Lowe timely objected to the documents. Therefore, because the chiropractor did not testify and the parties did not stipulate or otherwise agree to their admission, K.S.A. 44-519 prevents them from being entered into the evidentiary record.

(6) The Appeals Board adopts the findings and conclusions set forth in the Award to the extent they are not inconsistent with the above.

### **AWARD**

**WHEREFORE**, the Appeals Board reduces the permanent partial general disability from 28.5 percent to 5 percent and reduces the average weekly wage from \$264.15 to \$245.17.

**WHEREFORE**, Daneta Lowe is awarded compensation from Presbyterian Manors, Inc. for a September 30, 1995, accident and a 5% permanent partial general disability. Based upon a \$245.17 average weekly wage, Ms. Lowe is entitled to 20.75 weeks of permanent partial general disability benefits at \$163.45 per week for a total award of \$3,391.59, which is all presently due and owing less any amounts previously paid.

The remaining orders set forth in the Award are adopted to the extent they are not inconsistent with the above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of October 1998.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Brian D. Pistotnik, Wichita, KS  
Ross A. Hollander, Wichita, KS  
John D. Clark, Administrative Law Judge  
Philip S. Harness, Director